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NO. 282.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

THE UNITED STATES, *Appellant,*

vs.

WYCKOFF PIPE & CREOSOTING CO., INC.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

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THE FACTS.

The Solicitor General adequately states the facts of the case. The Government concedes liability upon the facts. The sole question concerns the measure of damage.

THE LAW.

The contract was entered into December 10, 1917, and appellee was to perform the work during the spring of 1918. Appellee was not permitted to do any of the work until January, 1919, and thereafter was delayed and interfered with by the Government until August, 1919, and April, 1920. During this war period prices of labor, material and other items were constantly mounting.

The findings enumerate the items of damage, but the evidence did not establish the amount of extra expense incurred upon each particular item.

In each instance when the Government permitted appellee to perform the contract work, additional work of the same character was also desired by the Government. For this additional work, appellee was requested to submit a proposal in which each item entering into the cost of doing the work at that time was analyzed. Such proposals for additional work of similar character was studied by the public works officer and found to be reasonable. The proposals were then submitted to a naval board appointed for the purpose of passing upon the reasonableness of the items involved, and in each instance this naval board found the cost of doing the work as submitted by appellee entirely reasonable and ordered appellee to proceed with performance. Inasmuch as the parties had, after full investigation, agreed upon the cost of doing the work at the time performance was permitted, it was felt that exact proof as to the amount of extra expense of each item was unnecessary even had it been practicable for appellee to secure evidence with any degree of certainty.

The court below accepted evidence of the agreement of the parties as to the cost of performance and estimated appellee's loss and damage upon the basis of the cost of doing similar work as agreed upon by the parties. It so happens that the court below also found that this agreed cost of doing the work was the reasonable value of the work to the Government and in so doing has found that the Government has received a benefit equal to the amount of the judgment now before this court.

The Government now contends that appellee should have proved, *item by item, the exact amount* of expense and loss caused to it by the unwarranted delay and interference,—a burden upon appellee, who never was at fault, well nigh impossible to meet. It is especially contended that because appellee showed splendid business judgment in securing certain quantities of lumber necessary to perform the contract at the time the contract was entered into and because the price of lumber increased between the time it was purchased and the time it was used in performance of the contract, that the Government should have the benefit of the increased price in lumber, less the cost of storage, insurance, etc. This contention is made by the Government without any showing upon its part that the cost of insurance, storage, overhead, interest upon investment and other carrying charges on the lumber and the necessary shrinkage of the same in storage was less than the difference in its cost and its value at the time the contract was performed.

Appellee proved that at the time the work was done even a naval board, after full investigation, agreed that the cost of doing exactly similar work was as great as appellee now contends was the cost to it of doing the

contract work. It is also reasonable to suppose that appellee's estimation of the cost of the additional work so readily agreed to by the Government as reasonable was much below the price for which the Government could have secured a performance of the additional work elsewhere, in view of the fact that appellee *did have lumber on hand*, its force of employees on the ground and a plant equipped and ready at the moment to do the precise work.

The Government contends that the correct measure of damage for the delay was the loss actually sustained by the contractor as the result of the delay. Appellee makes the same contention.

The Court of Claims sits both as judge and jury. The witnesses are before it and it views the evidence in the light of trial circumstances. The rule of law just above stated has been upon the books since the Civil War. The court below must be presumed to know it. *In arriving at the amount of the loss actually sustained by appellee* as the result of the delay, the court below felt it unnecessary to impose upon the party not at fault, the burden of doing an almost impossible, thing *i. e.*, proving in detail, item by item, the ever increasing cost during a war period of labor, material, freight rates, storage space, insurance and other carrying charges. The court was justified in its action, especially since both contracting parties, at the very time the work was finally performed, sat across the table and mutually agreed upon the cost of performing exactly similar work, and especially since the relation of appellee to the work was such as would indicate that the price submitted by appellee and accepted after full investigation by the Government was more than a reasonable price for performance.

That the court below should also find that the value of the work to the Government was equal to the cost should operate in the favor of appellee rather than against it, because in practically every reported case where damages have been awarded for delays caused by the Government, the Government has received little if any value in return.

The Government relies upon the cases of United States vs. Smith, 94 U. S. 214; United States vs. Mueller, 113 U. S. 153; United States vs. Barlow, 184 U. S. 123; Ripley vs. United States, 223 U. S. 695. Appellee relies upon the same cases. Appellee contends that when properly analyzed these cases fully support its position.

Proof of damage caused by delay, especially during war periods, is exceedingly difficult. Everyone knows that it is being incurred, but to properly allocate a portion of the overhead of a plant engaged in other work to the particular contract being delayed is well-nigh impossible; and it is even more difficult to determine the exact cost of holding a plant, its machinery and force of labor ready upon a moment's notice to begin performance. It is to be borne in mind that once a contract of this character is delayed, the plant and force of men must at all times be held in readiness to immediately begin performance when the defaulting party is ready; otherwise the party not at fault might be charged with a failure to minimize the damages and indeed might itself be accused of delay.

Courts recognize these facts, and whether it be a judge or a jury which assesses the damages, there must enter into the award a certain amount of "estimation" to cover obvious losses which cannot with exactness be proved. This court has repeatedly rec-

ognized the Court of Claims as both judge and jury.

In the Smith case, *supra,* this court said that,—

> "In the estimation of damages, the Court of Claims occupies the position of a jury under like circumstances. Damages must be proven. The court is not permitted to guess any more than the jury; but, like a jury, it must make its estimate from the proof submitted. The result of the best judgment of the triers is all that the parties have any right to expect."

The Smith case involved a delay caused by interference, and is strikingly similar to the case at bar. The court below held that the damages for the delay should be that sum which "in its opinion" from the evidence before it was necessary to place Smith in the same condition he would have been in if he had been allowed to proceed without interference; and it is curious to note that "in the opinion" of the court below, the amount that Smith was damaged was exactly $5,000.00. Such round sum award negatives any thought that the court below had before it exact proof, item by item, of "the loss actually sustained by the contractor as the result of the delay."

This court in affirming the judgment of the Court of Claims concluded its opinion by the language above quoted.

The case of United States v. Mueller, *supra,* was also very similar to the case at bar in that it was a suit for damages for a delay and interference caused by contemplated change of purpose in regard to the stone to be used for the contract work. In the Mueller case as in the case of Smith, the award was for a sum in round figures, *i. e.,* $20,000.00, from which fact it is

apparent that once again the court failed to have before it detailed proof, item by item, of the precise amount of loss caused by the delay; and that once again the court below estimated the damages from the proof before it as best it could; and that once again this court affirmed without comment the "estimation" of damages by the court below.

It is earnestly insisted that a trial court could have no better evidence of a loss caused by an unwarranted delay than the difference in the cost of doing the work at the time it should have been done and at the time it was actually done. As is apparent from the record in this case, the court knew from the contract the cost of performing the work at the time performance should have been permitted, and it also had before it the mutual agreement of the parties, arrived at only after thorough investigation by a naval board, as to the reasonable cost of doing the work at the time it was actually performed. Better evidence of the amount of loss and damage to the party delayed is not conceivable. Certainly such evidence is sufficient to warrant the court below in "estimating" damages.

An examination of the decisions of this court and of the Court of Claims in both the Mueller and Smith cases fails to disclose what evidence the court below had before it, but appellee feels safe in asserting that the court did not have before it a voluntary agreement of the parties as to the cost of doing the work at the delayed time; and the peculiar coincidence that the judgments in both the Smith and Mueller cases happen to be in round figures very plainly indicates that there was more "estimating" in those cases than in the instant case, because in the instant case the court did have a rule upon which to base the damage and that rule it applied with exactitude in its judgment.

The Government does not contend that what the court below did was inherently wrong,—it even intimates that the allowance of a cost of doing the work equal to a reasonable value would not produce an erroneous result. The sole contention of the Government is that because appellee earnestly sought to carry out its contract obligation and was diligent enough to purchase a part of the lumber required for the performance of the work, and that because the price of lumber increased, it should have the benefit of such increase in price. Appellee insists that since the Court of Claims had a reasonable rule for the estimation of damages, both in law and in fact, the burden of showing that such a basis was wrong shifts to the Government; and that until the Government can prove that the increase in the price of the lumber was greater than the loss by the shrinkage thereof and the cost of overhead, storage space, insurance, interest upon investment, and other items, its contention must fail.

It is reasonable to assume that were it possible for the truth to be known, the cost of carrying this lumber in stock was equally as great, if not in excess of the increase in the price thereof, because as above pointed out, where a contract is delayed there are so many elements of damage which never can be determined, that the party not at fault must necessarily lose even if he secures an award for all that can be given under the law and under the rules of evidence.

There is another way of looking at this case:

It is apparent from the record that when appellee knew that it was being damaged by the delay and be-

gan feeling around as to how best to protect itself, it was not receiving the benefit of legal counsel. Appellee had no desire to rescind the contract or to embarrass the Government during the war period. Although it was being greatly damaged it desired to proceed with the work as soon as the Government was ready, but inasmuch as it was being damaged without fault of its own, it sought to protect itself from loss. Appellee first inquired of the Government as to whether there was any precedent for making claim for the loss by delay and it stated to the Government that it was almost impossible to determine what the loss would be until the work was performed. The Government recognized the justice of appellee's claim and stated that final claims might be deferred until the work was done. Such action by the parties brought the case clearly within the settled law whereby actual loss caused by delay or interference might be recovered; and had the parties ceased negotiations at that point, the present contention of the Government would have greater force.

But as the time arrived for the performance of the work in each of the shops the Government desired additional work of the exact character. Believing appellee best equipped to do the additional work econonomically, the Government asked for a setup of figures as to the reasonable cost of performing the additional work. Appellee submitted such figures, item by item, and in so doing requested—

> "a readjustment of the *contract price* to cover the advance in the cost of materials during the past year and the advance in the cost of labor." (R. 33.)

And again that.—

> "this quotation (for additional similar work) covers what we have previously offered and are under contract to furnish at the rate of $2.26 per square yard in accordance with our proposal of November 12, 1917."

The new quotation was for $2.68 per square yard in one instance and in a later instance it was for $3.28 per square yard.

The Government did not immediately accept the figures of appellee. Its public works officer first analyzed the same and found them to be reasonable, but as such matters are handled in the navy, the itemized quotation of appellee was submitted to a naval board. This board investigated the situation fully and reported that the quotation of appellee was a reasonable price for the doing of the work at the time it was to be done. *Thereupon, the Government instructed appellee to proceed with the doing of both the contract work and the additional work.*

It is admitted that appellee had no intention of rescinding its contract, but the facts above detailed suggest that the original contract, insofar as price was concerned, was probably mutually abandoned by the parties. If we are correct in this contention, appellee is entitled to recover the new price mutually agreed upon.

CONCLUSION.

Appellee has been deprived of its damages for seven years in a case where the Government admits liability. The only dispute is as to what is the measure of damage. It is insisted that the Court of Claims had ample

basis upon which it could justly award the sum it has awarded, and it is furthermore insisted that the court has not gone any farther afield in this case, if as far, as it went in the Smith and Mueller cases, *supra*, both of which were affirmed by this court almost without comment insofar as the amount of damages was concerned.

It is regrettable that the time of the court must be taken with a case so small. Appellee, however, did not appeal. While as is stated by the Solicitor General, the amount is small insofar as the business of this court is concerned, it is quite large to this appellee. To grant the Government's contention that the case should be remanded would be but to penalize and further deprive appellee of its just due and in the end, it would probably develop that the actual loss to appellee, proved item by item and in detail would be as much if not greater than the parties at the time and with full knowledge of the facts agreed to be the reasonable cost of the work.

The judgment should be affirmed.

Respectfully submitted,

HARVEY D. JACOB,
Attorney for Appellee.

April, 1926.

SUPREME COURT OF THE UNITED STATES.

No. 282.—October Term, 1925.

United States, Appellant,
vs.
Wyckoff Pipe & Creosoting Co., Inc.
} Appeal from the Court of Claims.

[May 24, 1926.]

Mr. Justice Brandeis delivered the opinion of the Court.

The Wyckoff Pipe & Creosoting Co., Inc., contracted with the United States, in December, 1917, to lay creosoted wood block floors in Navy Yard buildings at Norfolk, Virginia, furnishing all necessary labor and materials. On a part of the job the contractor was to begin the work immediately after delivery of a copy of the contract. This part was to be completed within 30 days thereafter. On other parts, work was to be deferred until such time as the Government was ready to proceed. These parts were to be finished within 43 days from the dates on which they were begun. The flooring was to be set in a concrete base which was to be laid promptly by the Government. The contractor prepared itself immediately to perform the contract. Among other things, it purchased the lumber and creosote oil needed for the job. Long delays by the Government in furnishing the concrete bases prevented performance by the contractor. Thus more than two years elapsed before the work was completed. The contractor was without fault.

The Government's delays confessedly caused the contractor some loss. For the loss so suffered the Government was confessedly liable. It made payment at the fixed contract rate of $2.26 per square yard—and paid an additional amount, also provided by the contract, equal to 50 per cent. of the estimated increase in the labor cost. It paid nothing otherwise on account of the damages caused by its delay. To recover compensation for the loss suffered, this suit on the contract was brought in the Court of Claims in January, 1923. That court assessed the damages at $10,122.99;